No. 18-266

# In the Supreme Court of the United States

THE DUTRA GROUP,

*Petitioner*,

v.

CHRISTOPHER BATTERTON,

*Respondent*.

**On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit**

## BRIEF OF AT-SEA PROCESSORS ASSOCIATION, PACIFIC SEAFOOD PROCESSORS ASSOCIATION, GROUNDFISH FORUM, NATIONAL FISHERIES INSTITUTE, FREEZER LONGLINE COALITION, AND ALASKA BERING SEA CRABBERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## BRIEF OF AT-SEA PROCESSORS ASSOCIATION, PACIFIC SEAFOOD PROCESSORS ASSOCIATION, GROUNDFISH FORUM, FREEZER LONGLINE COALITION, NATIONAL FISHERIES INSTITUTE, AND ALASKA BERING SEA CRABBERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

### INTEREST OF THE *AMICI CURIAE*[1]

The At-sea Processors Association (APA) represents six companies that own and operate sixteen U.S.-flagged catcher/processor vessels that participate principally in the Alaska pollock fishery and west coast Pacific whiting fishery. By weight, these fisheries account for more than one-third of all fish harvested in the U.S. each year.

Pacific Seafood Processors Association (PSPA) is a nonprofit seafood industry trade association. Its corporate members are major seafood processing companies with operations in Alaska and Washington. PSPA was founded in 1914 to foster a better public understanding of the importance of the seafood industry and has been in continuous and active operation since that time.

Groundfish Forum (GF) is a trade association that represents five companies that operate 19 trawl catcher processor vessels in the yellowfin sole, rock

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. Both parties have filed blanket consents to the filing of *amicus* briefs with the Clerk.

sole, flathead sole, Atka mackerel, Pacific Ocean perch, and Pacific cod fisheries off Alaska. Groundfish Forum's mission is to promote the sustainable harvest and economic viability of fisheries while ensuring resource conservation, habitation protection, and practicable bycatch management.

The Freezer Longline Coalition (FLC) is a trade association representing participants in the freezer longline sector of the Alaska cod fishery. FLC includes 11 Washington and Alaska-based members which operate 30 vessels in the federal waters of the Bering Sea, Aleutian Islands, and the Gulf of Alaska. FLC members are united in their commitment to sustainable fishing practices in the North Pacific.

The National Fisheries Institute (NFI) represents hundreds of companies from all facets of the commercial seafood industry in the United States, including seafood harvesters, vessel owners, and processors dependent on those harvesters for product. NFI member companies produce, process, distribute, and serve to hundreds of millions of American consumers a sustainable, highly nutritious protein.

Members of The Alaska Bering Sea Crabbers (ABSC) fish for King, Snow, and Bairdi crab in the Bering Sea. They are also actively involved in scientific research, policy development, and marketing. ABSC is committed to ensuring the long-term sustainability of its members' fishery.

*Amici*'s members have a strong interest in the resolution of this case. As marine operators, each is subject to the Jones Act and to general maritime law doctrines such as unseaworthiness. *Amici* file this

brief to explain why the issue of punitive damages under maritime law is exceptionally important to the American maritime industry.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The maritime industry is the lifeblood of the economy of the United States—and of the world. It transports 90 percent of the world's goods.[2] It directly and indirectly accounts for 2.5 million American jobs and contributes $100 billion to the U.S. economy annually.[3] And it contributes hundreds of billions of dollars' worth of fish each year to the food supply.[4] In holding that punitive damages are available under the maritime doctrine of unseaworthiness, the decision below exposes this critical industry to a potentially massive increase in damages exposure—a result that is mistaken as a matter of law and misguided as a matter of policy. This Court should grant review of this important question and reverse the judgment below.

The doctrine of unseaworthiness is the predominant means of recovery for seamen injured on the job. The impact of the court of appeals' decision to make punitive damages available for unseaworthiness claims, if allowed to stand, will accordingly be sweeping. It will markedly increase maritime opera-

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[2] See Natasha Geiling, How the Shipping Industry is the Secret Force Driving the World Economy, Smithsonian.com, Oct. 15, 2013, perma.cc/E3R6-XSEN.

[3] Navy League of the U.S., *America's Maritime Industry* 14, perma.cc/AA7W-PAZB.

[4] See NOAA, Press Release, U.S. fishing generated more than $200B in sales in 2015; two stocks rebuilt in 2016, May 9, 2017, perma.cc/C5SY-FVN3.

tors' litigation costs, result in higher prices for consumers, make the U.S. maritime industry less competitive with industries in countries whose law precludes punitive damages, and lead to forum-shopping, as domestic and foreign plaintiffs alike elect to sue in the Ninth Circuit, Washington state court, and any other forum that subsequently joins that side of the split. These very troubling consequences warrant this Court's immediate intervention.

The decision below not only threatens grave harm to the maritime industry; it is also wrong on the merits. Permitting punitive damages in unseaworthiness cases destroys the uniformity between the unseaworthiness remedy and the Jones Act remedy and will lead to windfall recoveries in situations in which Congress clearly intended that plaintiffs recover only compensatory damages. The decision below accordingly should be reversed.

## ARGUMENT

### A. The Court Should Address The Question Presented Now.

The question presented—as to which lower courts undeniably are divided—arises frequently and thus cries out for this Court's attention. As this Court observed almost fifty years ago, "[t]he unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 399 (1970); see also *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 208 (1996) (unseaworthiness has "eclipsed ordinary negligence as the primary basis of recovery when a seafarer was in-

jured or killed"). The question whether punitive damages are available in unseaworthiness actions is thus a matter of paramount importance to maritime operators and seamen alike.

The split of authority on this issue merits this Court's immediate attention. As this Court has recognized, it is especially important that maritime law be uniform from jurisdiction to jurisdiction, because "the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities." *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 676 (1982); see also, *e.g.*, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (noting "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country'") (quoting *Moragne*, 398 U.S. at 402). It is self-evidently harmful to the maritime industry for maritime operators in one part of the country to be subject to greater potential liability than those in other parts of the country—or for one maritime defendant's legal exposure to vary depending on where its vessels operate and where shipboard accidents happen to occur. See Geoffrey L. Wendt, *The Fog of Uncertainty Enshrouding Employer Punitive Damage Liability Under General Maritime Law*, 2 MARITIME L. BULL. SPECIAL INSERT 1, 100 (2010).

The effects of the decision below will also be especially widely felt. In the most recent twelve-month period for which data are available, the Ninth Circuit saw the second greatest number of maritime-law personal injury appeals, after the Fifth Circuit,[5] and

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[5] See *U.S. Court of Appeals—Civil and Criminal Cases Commenced, by Circuit and Nature of Suit or Offense, During the*

saw the third greatest number of new maritime personal-injury cases commenced, after the Fifth and Eleventh Circuits.[6] The circuit split on this issue thus now encompasses two of the busiest forums in the Nation for adjudicating maritime injury cases.

Moreover, injured seamen will now surely bring unseaworthiness claims in the Ninth Circuit (or Washington state court) whenever possible. And although personal-jurisdiction rules may limit the extent to which cases can be brought in the Ninth Circuit, they are unlikely to prevent such forum shopping entirely. The Ninth Circuit's jurisdiction encompasses the entirety of the American West Coast, as well as Alaska, Hawaii, and the Pacific Ocean territories of Guam and the Northern Mariana Islands. Many shipping companies and other maritime employers do business within the Ninth Circuit and could be haled into court there in many cases, on either a general- or specific-jurisdiction theory. And as this Court has noted in a related context, a difference between U.S. and foreign law is likely to encourage foreign plaintiffs to bring claims in U.S. courts. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 403-04 (1975) ("[T]he United States is now virtually alone among the world's major maritime nations in not adhering to the [Brussels Collision Liability] Convention with its rule of proportional fault—a fact that encourages transoceanic forum shopping.").

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*12-Month Period Ending March 31, 2018* (2018), http://www.uscourts.gov/file/24414/download

[6] See *U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2017* (2017), http://www.uscourts.gov/sites/default/files/data_tables/jb_c3_0930.2017.pdf.

In short, the decision below introduces significant uncertainty into one of the most important doctrines in maritime law, by creating a critical disparity between defendants' potential liability for unseaworthiness in the Ninth Circuit and their risk of such liability elsewhere. The impact of this disparity will be to burden maritime defendants and undermine the uniform system of maritime law. That prospect warrants this Court's intervention without delay.

### B. The Question Presented Is Vitally Important To The Maritime Industry And To The National Economy.

Allowing plaintiffs to recover punitive damages for unseaworthiness claims would have a critical impact on the U.S. maritime industry. Defendants' potential liability, and their vulnerability to settlement pressure, would rise dramatically—causing an increase in litigation costs that would make these companies less competitive with foreign maritime operators and increase the prices that their consumers pay.

1. Opening the door to punitive damages in unseaworthiness cases would make such cases far more difficult for defendants to litigate. As a leading authority on tort law has explained, the "risk of suffering a crushing punitive damages penalty" discourages defendants from litigating claims on the merits, leading to "so-called 'blackmail settlements'" in which claims are settled for more than they are "reasonably worth." James A. Henderson, Jr., *The Impropriety of Punitive Damages in Mass Torts* 21, 52 Ga. L. Rev. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009389. Indeed, "uncounted thousands of cases

settle on terms different than those on which they would otherwise settle because of the possibility of punitive damages." Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 625 (1997).

This Court has recognized the same dynamic in the class-action context, where class certification—or even the mere styling of a lawsuit as a putative class action—exerts tremendous pressure on a defendant to settle. See, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) (describing "the risk of 'in terrorem' settlements that class actions entail"); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

To be sure, this Court has held that punitive damages in maritime cases generally should not exceed the amount of compensatory damages (*Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 513 (2008)), and that guidance would presumably apply to punitive damages for unseaworthiness if such damages were held to be available. But since the decision in *Exxon Shipping*, courts have *not* uniformly limited punitive damages to the amount of compensatory damages in maritime cases. See, *e.g.*, *Warren* v. *Shelter Mut. Ins. Co.*, 233 So. 3d 568, 599 (La. 2017) (reducing $23 million punitive award to $4.25 million where compensatory damages were $125,000 on ground that $4.25 million is twice the total value of the harm caused by the conduct); *McWilliams* v. *Exxon Mobil Corp.*, 111 So. 3d 564, 579 (La. Ct. App. 2013) (upholding $12 million punitive award in case involving $5.5 million in actual damages); *Clausen* v.

*Icicle Seafoods, Inc.*, 272 P.3d 827, 834 (Wash. 2012) (refusing to reduce $1.3 million punitive award where compensatory damages for maintenance and cure were $37,420 and attorneys' fees and costs, which court included in denominator, were $428,105). Moreover, even a 1:1 cap would be cold comfort because compensatory damages in unseaworthiness cases can reach into the multiple millions of dollars.[7] Even allowing double the already-considerable damages available in unseaworthiness cases would put maritime operators in a highly precarious position.

The predictable effect of making punitive damages available in unseaworthiness cases, therefore, will be to coerce maritime defendants into settling even dubious unseaworthiness claims, raising their litigation costs. Because those costs are likely to be passed on to consumers, the result will be higher prices for fish or any other commodity harvested or transported by ships.

2. Permitting punitive damages in this context would also undermine the American maritime industry's ability to compete with other countries. Many European countries follow the civil-law tradition, under which punitive damages are generally unavailable in civil cases. See John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507,

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[7] See, *e.g.*, *Doss* v. *M/V K2*, 2016 WL 6962501, at *3 n.13 (E.D. La. Nov. 29, 2016) (indicating that plaintiff was seeking $1.5 million in compensatory damages); *Burdett* v. *Matson Navigation Co.*, 2015 WL 419694, at *1 (D. Haw. Jan. 30, 2015) (indicating that plaintiff was seeking $7 million in compensatory damages).

510 & n.16 (2007) (citing sources from Switzerland, Italy, Belgium, Spain, Germany, Finland, Greece, Poland, Russia, the Czech Republic, and the Netherlands); see also *Exxon Shipping*, 554 U.S. at 497 ("Noncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries as France, Germany, Austria, and Switzerland."). The same is true in Japan. See 2 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 22.2(B)(10) (7th ed. 2015). And in China, punitive damages are available only in certain consumer cases. See Vincent R. Johnson, *Punitive Damages, Chinese Tort Law, and the American Experience*, 9 FRONTIERS L. CHINA 321, 321-22 (2014).

Maritime defendants' damages exposure is thus dramatically greater under the court of appeals' view of U.S. maritime law than under the law of other nations. Imposing that potential liability on the American maritime industry will invariably raise the industry's costs—driving business toward maritime companies that use ships flagged in other countries and have less exposure to U.S. maritime law.[8]

### C. The Decision Below Is Erroneous.

The need for this Court's review is made all the more urgent because the decision below is wrong. As petitioner explains (Pet. 12-23), the court of appeals' decision cannot be reconciled with this Court's hold-

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[8] To be sure, under the multifactor test articulated by this Court in *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953), a tort involving a foreign-flagged ship may sometimes be adjudicated under U.S. maritime law. But this is the exception rather than the rule. As the Court explained in *Lauritzen*, "the weight given to the [flag] overbears most other connecting events in determining applicable law." *Id.* at 585.

ing in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990), that the limitations imposed by Congress on recoverable damages under the Jones Act apply to "general maritime actions"—such as unseaworthiness—as well. But even if *Miles* had not so held, the decision below would be just as indefensible.

To begin with, relying on this Court's decision in *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404 (2009), the court of appeals assumed that punitive damages were available in unseaworthiness cases prior to the passage of the Jones Act. Pet. App. 12a. But that assumption is unfounded. When five judges of the Fifth Circuit examined the issue, they noted only one unseaworthiness case potentially awarding punitive damages around the time of the Jones Act—and in fact, that case *post*dated the Jones Act and did not appear to be a punitive damages case at all. See *McBride* v. *Estis Well Serv., LLC*, 768 F.3d 382, 395-96 (5th Cir. 2014) (en banc) (Clement, J., concurring) (citing *The Rolph*, 293 F. 269 (N.D. Cal. 1923)). Moreover, during the thirty years after the passage of the Jones Act (1920-1950), injured seamen almost exclusively brought Jones Act claims rather than unseaworthiness claims. *Id.* at 397. That choice would have been irrational if unseaworthiness actions permitted punitive damages that Jones Act actions did not. *Ibid.* Thus, there is no basis upon which to conclude that punitive damages were historically available in connection with unseaworthiness claims.[9]

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[9] This Court's statement in *Townsend* that "[h]istorically, punitive damages have been available and awarded in general maritime actions" (557 U.S. at 407) does not suggest that punitive damages were historically available for unseaworthiness claims. *Townsend* was a maintenance-and-cure case, and as this Court has previously recognized, the maintenance-and-cure

Moreover, irrespective of whether punitive damages were available in unseaworthiness cases prior to the Jones Act, it would not make sense to interpret the unseaworthiness doctrine to permit punitive damages in light of the passage of the Jones Act and the close relation between the two causes of action.

Unseaworthiness claims and Jones Act claims—and the remedies available thereunder—have long been closely linked. Congress enacted the Jones Act in response to this Court's decision in *The Osceola*, 189 U.S. 158, 175 (1903), which had held that a seaman was "not allowed to recover an indemnity for the negligence of the master, or any member of the crew." The negligence action brought into being by the Jones Act was thus "an alternative" to a traditional unseaworthiness claim, and a seaman accordingly was entitled to recover under a negligence theory, or an unseaworthiness theory, but not both. *Pac. S.S. Co.* v. *Peterson*, 278 U.S. 130, 138 (1928). That was so, this Court explained, because whether "the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to but *one indemnity by way of compensatory damages*." *Ibid.* (emphasis added) (citation omitted).

The rule requiring a seaman to choose between an unseaworthiness claim and a Jones Act claim has since been abrogated (see *McAllister* v. *Magnolia Pe-*

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cause of action—a contract-based cause of action by which sick or injured seamen can recover expenses while recovering—is "unlike" the "indemnity" created for unseaworthiness. *Aguilar* v. *Standard Oil Co. of N.J.*, 318 U.S. 724, 730 (1943).

*troleum Co.*, 357 U.S. 221, 223 n.2 (1958)), but the two remedies remain closely related. Indeed, in light of the judicial expansion of the unseaworthiness cause of action over the course of the twentieth century, the two remedies now substantially overlap. See G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 383 (2d ed. 1975)). Today, many, if not most, plaintiffs can bring unseaworthiness claims to recover for injuries for which the *only* available remedy at the time of the Jones Act's passage would have been a Jones Act negligence claim. See *McBride*, 768 F.3d at 400-01 (Clement, J., concurring).

In light of the increased overlap between Jones Act and unseaworthiness claims in modern times, the notion that punitive damages may be awarded in connection with unseaworthiness claims is untenable. It has long been established that punitive damages are not available under the Jones Act, because the Jones Act incorporated "unaltered" the remedies available under the Federal Employers Liability Act ("FELA"), which do not include punitive damages. *Miles*, 498 U.S. at 32; see *McBride*, 768 F.3d at 388 ("Because the Jones Act adopted FELA as the predicate for liability and damages for seamen, no cases have awarded punitive damages under the Jones Act."); *Miller* v. *Am. President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993) ("Punitive damages are not * * * recoverable under the Jones Act."); *Bergen* v. *F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987), *opinion modified on reh'g*, 866 F.2d 318 (9th Cir.1989) ("Punitive damages are non-pecuniary damages unavailable under the Jones Act."). If the court of appeals were correct that punitive damages *are* available for unseaworthiness claims, which now can effectively replicate Jones Act claims, Congress's intent in the Jones Act to limit seamen's right of re-

covery to compensatory damages would be thwarted by judicial fiat.

Indeed, permitting the recovery of punitive damages in unseaworthiness cases could relegate the Jones Act to near-complete irrelevance. Plaintiffs would have little reason to bring a Jones Act claim, which requires proof of negligence and offers only compensatory relief, if they could bring an unseaworthiness claim, which brings with it the promise of strict liability (*Yamaha*, 516 U.S. at 208) and—as the court below and Washington Supreme Court see it—the potential for punitive damages. Perhaps plaintiffs would continue to join Jones Act claims to unseaworthiness claims in order to ensure that both would be tried to a jury. Cf., *e.g.*, *Fitzgerald* v. *U.S. Lines Co.*, 374 U.S. 16, 21 (1963) (holding that although jury trials are not required in admiralty cases, "a maintenance and cure claim joined with a Jones Act claim must be submitted to the jury when both arise out of one set of facts"). But that outcome—in which the Jones Act would serve, at most, as a vehicle for obtaining a jury trial on a different cause of action—cannot be squared with the "uniform plan of maritime tort law Congress created in * * * the Jones Act." *Miles*, 498 U.S. at 37.

## CONCLUSION

The petition should be granted.

Respectfully submitted.

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